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No. 94-820

In the Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA) allows modification of a benefits award "on the ground of a change in conditions." 33 U.S.C. 922. As we explain in our opening brief, the term "change in conditions" is most naturally read—by itself, in light of this Court's decisions construing Section 22, and in context with other provisions of the LHWCA—to include a change in any of the conditions that affect the claimant's entitlement to an LHWCA benefits award. Gov't Br. 9-12. Respondent Rambo disagrees, arguing, based on his reconstruction of the

LHWCA's legislative history, that the term "change in conditions" refers only to a change in the claimant's "physical condition." Resp. Br. 12-28. He additionally contends that the Director's interpretation of the LHWCA is entitled to no deference, *id.* at 10-11, and that the Director's approach would lead to unrestricted reopening of claims and other anomalies, *id.* at 29-35, 36-37. Rambo is mistaken as to each of those contentions.

1. When a court construes a statute, its starting point is the statutory language. When that language speaks clearly to the issue in question, the court's inquiry, "in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Section 22 of the LHWCA provides for modification of a disability award "on the ground of a change in conditions." 33 U.S.C. 922. The plural term "conditions" does not restrict modification to a change in the employee's "physical condition." By its plain terms, it allows modification based on a change in any of those conditions that determine the claimant's statutory entitlement to benefits.

As we explain in our opening brief, the LHWCA provides disability benefits on account of an injury-caused loss of wage-earning capacity. See 33 U.S.C. 902(10) (defining disability); 33 U.S.C. 908(c)(21) (setting out compensation for non-schedule injuries). A change in conditions that increases an injured employee's wage-earning capacity, whether it results from physical recuperation or from acquisition of new job skills, is a relevant "change in conditions" for purposes of Section 22. See Gov't Br. 14-15. Construing Section 22 according to its plain terms is fair to employers and employees; it

gives meaning to the LHWCA's reporting requirements; it furthers the statutory goal of rehabilitating disabled workers; and it avoids the perverse incentives and costs of the court of appeals' approach, which would allow modification based only on a change in the claimant's physical condition. See Gov't Br. 15-19.

Rambo argues for a contrary result based on his construction of the legislative history of the 1934, 1938, and 1984 amendments of Section 22 of the LHWCA, none of which altered the phrase "change in conditions" in that Section. See Resp. Br. 12-35. Rambo essentially asks the Court to ignore express statutory language in favor of dubious inferences from legislative reports that do not squarely address either the relevant statutory language or the legal issue presented in this case. This Court has rejected similar arguments on past occasions, explaining that when the language of a statute is clear, there is no need to examine legislative history. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Ardestani* v. *INS*, 502 U.S. 129, 136 (1991). And as the Court has observed, post-enactment legislative history particularly is "an unreliable guide to legislative intent." *Chapman* v. *United States*, 500 U.S. 453, 464 n.4 (1991). Rambo's argument demonstrates the accuracy of that observation.

Rambo contends that Congress's amendment of Section 22 without comment on the meaning of the term "change in conditions" amounts to implicit approval of a "clear, bright line ruling"—supposedly adopted in *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), and other lower court decisions—that the parties can reopen a disability award only upon "a showing that

the claimant's 'physical condition' had changed since the prior award." Resp. Br. 8. As we explain in our opening brief, *McCormick* did not adopt Rambo's "bright line rule." Gov't Br. 20-21. See *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1231 (4th Cir. 1985). The other decisions that Rambo cites contain, at most, errant or obiter dicta on the subject. See Gov't Br. 21-24. Thus, Rambo cannot demonstrate that Congress has "re-enact[ed] statutory language that has been given a consistent judicial construction." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994); *Pierce* v. *Underwood*, 487 U.S. 552, 566-567 (1988). Indeed, Rambo is unable to show that Congress knew or approved of that dicta. See *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994).

Congress's 1934 amendments of Section 22 are silent on the meaning of the term "change in conditions." The 1934 amendments extended the time for reopening an award (from any time during the term of the award until one year after the last payment of compensation) and broadened the grounds for reopening to include a "mistake in a determination of fact" in addition to a "change in conditions." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 463-464 (1968) (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)). But the amendments left the phrase "change in conditions" untouched, and the legislative reports did not discuss that phrase or any case law construing it. The legislative history provides no reason to think that Congress understood that phrase to depart from its ordinary meaning, which is not limited to a change in the employee's physical condition. See *Banks*, 390 U.S. at 465 (construing Section 22's term "determination of

fact" based on its "ordinary meaning"); see also *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 8-11 (1975).

Congress's 1938 amendment of Section 22 also provides no support for Rambo's position. Congress broadened Section 22 to allow modification not only within one year from the last payment of compensation, but also within one year from the denial of an award. See *Intercounty Constr.*, 422 U.S. at 11; *Banks*, 390 U.S. at 464-465. But nothing in that amendment or its legislative history indicates that Congress intended to restrict the ordinary meaning of "change in conditions." See Gov't Br. 26 & n.19. Rather, the reports accompanying those amendments suggest that Congress understood that modification was generally available based on a change in wage-earning capacity. See S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938) (awards for partial loss of wage-earning capacity under Section 8(c)(21) and (e) of the LHWCA, 33 U.S.C. 908(c)(21) and (e), are "subject to readjustment from time to time over long periods"); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938) (same).

Congress's 1984 amendment of Section 22 is also unhelpful to Rambo's position. As we discuss in our opening brief (Gov't Br. 27), Congress amended Section 22 to give employers, such as petitioner in this case, the opportunity to seek modification of awards that are paid primarily by the Special Fund that the Director administers. Congress enacted that amendment in conjunction with the addition of Section 8(j) to the LHWCA, which allows employers to require disabled employees to submit reports of their earnings. 33 U.S.C. 908(j). As we explain in our opening brief, Congress's enactment of Section 8(j)'s reporting requirements reflects an understanding that

an employer could seek modification of a past award upon a showing of a change in the employee's wage-earning capacity, whether or not the employee's physical condition had changed. See Gov't Br. 16-17, 27.

Rambo cites congressional committee and conference statements respecting the 1984 amendments, which indicate that "the basis or grounds for seeking a modification remains as under current law," Resp. Br. 23-24 (quoting S. Rep. No. 81, 98th Cong., 1st Sess. 37-38 (1983)), and that "the conferees do not intend to expand or contract the rights of an employer or carrier beyond those prevailing in a non-special fund case," Resp. Br. 25-26 (quoting 130 Cong. Rec. 25,502 (1984)). Those statements do not support Rambo's position. As they implicitly acknowledge, "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce*, 487 U.S. at 566. And as we have explained, the courts have never definitively accepted Rambo's version of the "current law." See Gov't Br. 20-24. Rambo is likewise mistaken in suggesting that Congress implicitly supported his restrictive interpretation of the term "change in conditions" by rejecting a proposed amendment that would have allowed modification "at any time." Resp. Br. 22-27. That failed amendment says nothing about which "conditions" bear on the question of modification within Section 22's existing time period. See generally Pet. Br. 21-34.

2. Rambo argues that the Court should not give deference to the Director's construction of Section 22. Resp. Br. 10-12. The question whether the Director's interpretation is entitled to deference would arise, however, only if this Court concludes that Sec-

tion 22's language is ambiguous. See, *e.g.*, *Estate of Cowart*, 112 S. Ct. at 2594-2595. In that circumstance, the Director's interpretation should receive the deference that is normally accorded to an agency official's reasonable construction of a statute that the official is charged with administering. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

As the Court recently noted, the Director's authority to administer the LHWCA includes "the power to resolve legal ambiguities in the statute." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 93-1783 (Mar. 21, 1995), slip op. 13. Rambo contends that the Director's interpretation of an ambiguous statutory provision is not entitled to deference where the Director "appears as a litigant in an adversarial proceeding." Resp. Br. 10-11 (quoting *Director, OWCP* v. *General Dynamics Corp.* (*Krotsis*), 900 F.2d 506, 510 (2d Cir. 1990)). Rambo's reliance on *Krotsis*, however, is misplaced. The Second Circuit has overruled that decision, correctly recognizing that this Court "squarely rejected" its reasoning in *Martin* v. *OSHRC*, 499 U.S. 144 (1991). *Director, OWCP* v. *General Dynamics Corp.* (*Bergerson*), 982 F.2d 790, 795 (1992).

This Court ruled in *Martin* that the Secretary of Labor's construction of a safety standard under the Occupational Safety and Health Act was entitled to deference, even though it was advanced through an enforcement action before the Occupational Safety and Health Review Commission, because the Secretary's interpretation of her regulation in the administrative adjudication "*is* agency action, not a *post hoc* rationalization of it." 499 U.S. at 157. The

Court explained that "the Secretary's litigation position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *Ibid.*

As the Court's decision in *Martin* indicates, the Director's interpretation of an ambiguous provision of the LHWCA is entitled to deference, regardless of whether she has announced her interpretation through rulemaking or in the course of an administrative adjudication, because it reflects the responsible agency official's determination of a matter that Congress has left to the official's charge. The Director necessarily construes ambiguous terms of the LHWCA in the course of administering the benefits program. Like other agency officials, the Director has discretion in choosing how best to administer the statute, and she can announce official interpretations through rulemaking, participation in an administrative adjudication, or other more informal means. See *United States* v. *Alaska*, 112 S. Ct. 1606, 1619 (1992); *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991); *Martin*, 499 U.S. at 157. Those interpretations are entitled to a measure of deference regardless of the form that they take. *Ibid.* The issue of deference in this case, however, can be set to one side. The Director's interpretation should prevail because it is the most reasonable construction of the statute. See Gov't Br. 25-30.

3. Rambo also asserts (Resp. Br. 29-31) that the Director's construction of the term "change in conditions" would allow virtually unlimited reopening of cases and create administrative problems for the De-

partment and uncertainty for insurance carriers. That policy issue, however, is for Congress rather than the courts. Congress has elected to allow a reopening of benefit awards based upon a "change in conditions." That choice does indeed permit more reopenings than if Congress had allowed modification of awards only upon a change in the claimant's "physical condition." But Congress was entitled to strike that balance in formulating "a scheme for fair and efficient resolution of a class of private disputes." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, slip op. 10. See *Estate of Cowart*, 112 S. Ct. at 2598.

In any event, Rambo's concerns are overstated. As we explain in our opening brief (Gov't Br. 28-30), the Director's construction does not lead to unlimited reopening. Indeed, eleven years of experience since the Board's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), confirms that the Director's construction is workable. Rambo's construction presents the more serious problems of administration, because it creates perverse incentives for employers to delay claims adjudication and for employees to delay rehabilitation. Gov't Br. 19; see also Pet. Br. 12; Brief of Indus. Indem. Ins. Co. as Amicus Curiae in Support of Pet'r 15.

Rambo also argues (Resp. Br. 33-35) that reopening benefits awards on a ground other than a change in the claimant's physical condition would result in the use of one method for evaluating claims in the initial hearing and a different method in the modification proceeding. That assertion, however, is

incorrect. In both cases, a claimant is entitled to a non-schedule award of benefits only if the claimant has suffered a physical injury that has caused a loss of wage-earning capacity. See Gov't Br. 12-16. In both cases, an employer can defeat an award by establishing *either* an absence of injury *or* no loss of wage-earning capacity. See 33 U.S.C. 908(a) and (c)(21) (benefits awarded for disability); 33 U.S.C. 902(10) ("disability" defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"); Gov't Br. 28. Thus, the same method is used for a modification as for an initial decision. See *Fleetwood*, 776 F.2d at 1232.*

* * * * *

* This Court recently ruled that the Director cannot seek court of appeals review of Benefits Review Board decisions unless she satisfies Section 21(c) of the LHWCA, 33 U.S.C. 921(c), which allows appeals by those who are "adversely affected or aggrieved" by the Board's decision. See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co., supra*. The question of the Director's standing to appeal is not directly before the Court here, because the Director participated as a respondent supporting the Benefits Review Board's decision in the court of appeals, the Court has not granted the Director's petition for a writ of certiorari, and the Director is participating as a respondent supporting the private petitioner in this proceeding. See slip op. 5 n.2. The Court has expressly reserved the question whether the Director can establish standing to appeal based on a decision's impact on the LHWCA Special Fund. See *id.* at 3 n.1, 6 n.3.

For the reasons stated in our opening brief and herein, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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